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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/765,260	01/27/2004	Hai H. Trieu	31132.173	9578
46333	7590	09/09/2005	EXAMINER	
HAYNES AND BOONE, LLP 901 MAIN ST SUITE 3100 DALLAS, TX 75202			ISABELLA, DAVID J	
			ART UNIT	PAPER NUMBER
			3738	

DATE MAILED: 09/09/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

SF

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>
	10/765,260	TRIEU, HAI H.
	<b>Examiner</b>	<b>Art Unit</b>
	DAVID J. ISABELLA	3738

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).

Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 06 June 2005.
- 2a) This action is FINAL.                    2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1-69 is/are pending in the application.
- 4a) Of the above claim(s) 5,6,14,19,20 and 23-57 is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1-4,7-13,15-18,21,22 and 58-69 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or.(f).
- a) All    b) Some \* c) None of:
  1. Certified copies of the priority documents have been received.
  2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)	4) <input type="checkbox"/> Interview Summary (PTO-413)
2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)	Paper No(s)/Mail Date: _____
3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date <u>6/23/2005</u>	5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)
	6) <input type="checkbox"/> Other: _____

***Claim Rejections - 35 USC § 112***

Claim 2 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1 as worded fails to allow for the changing of the assembly and the features between the first and second endplates. Claim 2 contradicts the assembly as set forth in claim 1 and therefor is indefinite. Claim 1 as worded does not allow for interchangeable coupling between the first and second endplate assembly. Claim 1 defines the second end portion as being pivotable with respect to the second endplate assembly while claim 2 requires that the second endplate assembly be limited to lateral translation with respect to the second end portion. Similar arguments is made for the first endplate and first end portion.

***Claim Rejections - 35 USC § 102***

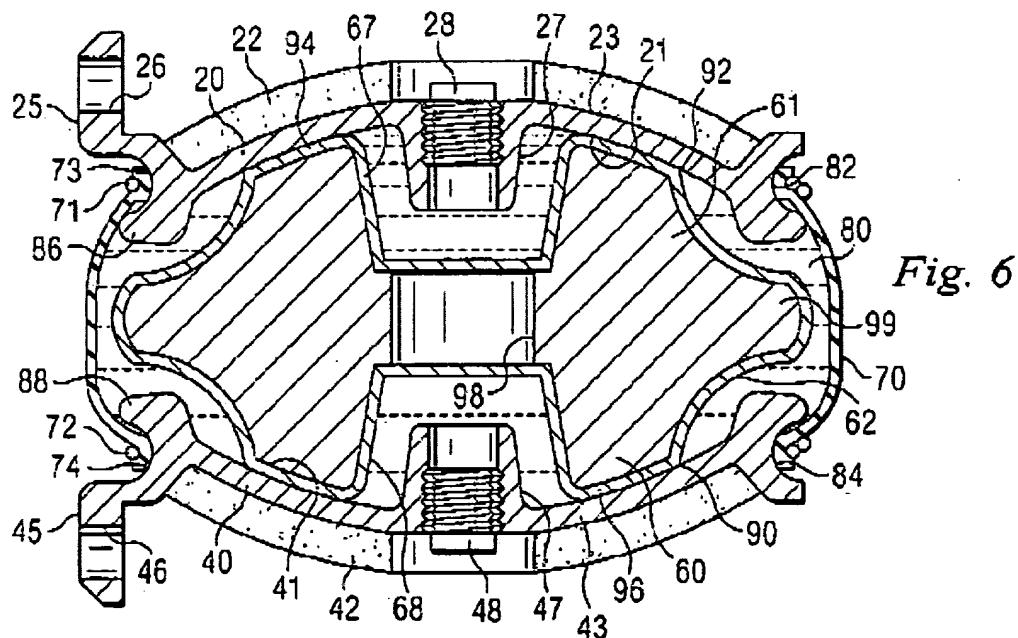
The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1-4,7,13,15-16,21,22,58-68 are rejected under 35 U.S.C. 102(e) as being anticipated by Bryan et al (2003/0135277)

Bryan et al discloses a vertebral implant for interposition between two vertebral endplates comprising: a first endplate assembly for engaging a first vertebral endplate; a second endplate assembly for engaging a second vertebral endplate; and a first flexible core component interposed between the first and second endplate assemblies, the first flexible core component comprising a first end portion and a second end portion, wherein the first end portion is coupled to the first endplate assembly to limit lateral translation of the first end portion with respect to the first endplate assembly and wherein the second end portion is pivotable with respect to the second endplate assembly. See figure 6 below.



Claim 2, in so far as definite (ie if claim 1 were rewritten to allow either the first or second end plate assembly to possess the features as claimed) examiner can call either endplate a first or a second endplate assembly.

Claim 3, as broadly worded, the device of Bryan et al discloses an implant wherein the first endplate assembly articulates in a direction transverse to a longitudinal axis extending through the first and second vertebrae.

Claims 4, the flexible core component comprise wear resistant articulating surface and the second endplate comprise articulating surface.

Claim 7, the surfaces 94 and 96 are flat.

Claim 13, see second wear resistant surface of Bryan et al.

Claim 15, see core material of Bryan et al.

Claims 58-68, see rejections as set forth supra.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 8-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bryan et al (2003/0135277) as applied to claims 1 and 4 above, and further in view of Marino et al (2004/0133278).

While Bryan et al discloses a list of materials used to form the coated surface of the core, Marino et al teaches other equivalent coatings used to form low friction bearing coatings on polymers. If not inherent in Bryan et al to use other known wear resistant coating to provide good tribologic properties to the core of Bryan et al would have been obvious from the teachings of Marino et al.

Claim 12 is rejected under 35 U.S.C. 103(a) as being unpatentable over Bryan et al (2003/0135277) as applied to claim 4 above, and further in view of Marino et al (2004/0133278) and Sioshansi (5492763 or 4743493).

Sioshansi teaches the concept for producing a polymer surface having metal ions implanted therein to provide enhance in vivo properties including wear and biocompatibility. To provide an ion implanted surface into the polymer of Bryan et al in place of a bonded surface coating to prevent delamination of the applied layer would have been obvious from the teachings of Sioshansi.

Claims 17,18 and 69 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bryan et al (2003/0135277) as applied to claim 1 above, and further in view of Ward, et al (6692528).

Ward teaches the use of copolymer blend of silicone and polyurethane, with the material having hydrophilic nature, as a core component in spinal. To use copolymer blend of polyurethane and silicone to form the resilient core of Bryan et al would have been obvious to one with ordinary skill in the art based on substitution of equivalent elements.

***Response to Arguments***

Applicant's arguments filed 6/6/2005 have been fully considered but they are not persuasive.

***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to DAVID J ISABELLA whose telephone number is 703-308-3060. The examiner can normally be reached on MONDAY-THURSDAY.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, CORRINE MCDERMOTT can be reached on 571-272-4754. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



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